

Before the Appeals Board entered its Order, the respondent filed an Application for Preliminary Hearing requesting that the compensation benefits awarded in the October 5, 1998, preliminary hearing Order be terminated. On January 6, 1999, that preliminary

hearing was held and in the January 7, 1999, preliminary hearing Order, that is the subject of this appeal, the Administrative Law Judge denied respondent's request to terminate benefits.

On appeal, the respondent has requested the Appeals Board to reverse the Administrative Law Judge, contending the claimant failed to prove his low back was injured while he was employed by the respondent. Further, respondent contends claimant did not give the respondent timely notice of the work-related accident.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the preliminary hearing record and considering the arguments contained in the briefs of the parties, the Appeals Board finds as follows:

The Appeals Board concludes claimant's testimony established that he developed low-back and leg pain while working for the respondent on a construction project at Fort Riley, Kansas. Claimant was a laborer whose job duties consisted of sledge hammering, placing debris in buckets, wheel barreling the buckets to a dumpster, and dumping the buckets of debris into the dumpster. Claimant started having pain and discomfort in his low back and down his legs on May 6, 1998. He continued to work performing the heavy construction duties until May 20, 1998, when he testified the respondent laid him off because of lack of work.

Claimant sought treatment for his low-back injury on his own from James R. Croy, D.C., in Junction City, Kansas. Dr. Croy treated claimant on May 7, 1998 and May 8, 1998. On May 7, 1998, the doctor fitted claimant with a back support. Claimant testified he wore the back support while he continued to work for the respondent until he was laid off.

After claimant was laid off, his attorney sent him for an examination to orthopedic surgeon Sergio Delgado, M.D., in Topeka, Kansas. Dr. Delgado saw the claimant on August 24, 1998, and his report, admitted into evidence at the first preliminary hearing, indicates claimant gave Dr. Delgado a consistent history of developing low-back and leg pain while working for the respondent. Dr. Delgado referred claimant for an MRI examination.

The MRI examination showed a central and right-sided L4-5 disc protrusion. Dr. Delgado then referred the claimant to neurosurgeon Craig H. Yorke, M.D., in Topeka, Kansas. Claimant was examined by Dr. Yorke on December 1, 1998, and again he gave a consistent history of how his low back symptoms started while working for the respondent. Dr. Yorke diagnosed a combination of a herniated disc at L4-5 on the right with some lateral recess stenosis. Claimant was placed in a physical therapy program. Dr. Yorke indicated, if claimant did not improve, the benefits and risks of surgery would be discussed with the claimant.

Claimant testified he told his immediate supervisor, Mark Higgins, that his back started hurting while he was performing the heavy job duties at work on May 6, 1998. Also claimant testified he telephoned the job superintendent, Everett Harmer, on the evening of May 6, 1998, and told Mr. Harmer that he had hurt his back at work.

The respondent's job superintendent, Everett Harmer, testified before the Administrative Law Judge at the January 6, 1999, preliminary hearing. The Appeals Board acknowledges that Mr. Harmer testified claimant told him his back was hurting. But when Mr. Harmer asked claimant whether he hurt his back at work, claimant said he thought he had pulled a muscle at home and not at work. Mr. Harmer also testified that claimant's supervisor, Mark Higgins, had told Mr. Harmer claimant had never notified him that he hurt his back at work.

The conclusion of the Administrative Law Judge to deny respondent's request to terminate benefits had to be based on the Administrative Law Judge believing claimant was truthful. The Administrative Law Judge had the opportunity to assess the credibility of the witnesses as both the claimant and respondent's representative, Everett Harmer, testified in person before him. The Appeals Board has on other occasions given some deference to the Administrative Law Judge's conclusions because he had the opportunity to see the witnesses testify in person. Accordingly, giving some deference to the Administrative Law Judge, the Appeals Board finds that the preliminary hearing Order dated January 7, 1999, denying respondent's request to terminate compensation benefits is affirmed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Bryce D. Benedict's preliminary hearing Order dated January 7, 1999, should be, and hereby is, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 1999.

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BOARD MEMBER

c: Jeff K. Cooper, Topeka, KS  
Michael W. Downing, Kansas City, MO  
Bryce D. Benedict, Administrative Law Judge  
Philip S. Harness, Director